



2025:DHC:8382



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision: 22.08.2025***

+ **C.R.P. 77/2022 & CM APPL. 24492/2022**

KIRAN GUPTA

.....Petitioner

Through: Mr. Kamlesh Anand, Advocate.

versus

NINA GUPTA & ORS.

.....Respondents

Through: Mr. Rahul Malhotra & Mr. Siddharth
Singh, Advs. for R-1.
Mr. Neeraj Kumar, Adv. for DDA.

CORAM:

HON'BLE MS. JUSTICE TARA VITASTA GANJU

TARA VITASTA GANJU, J.: (Oral)

1. The present Petition has been filed by the Petitioners under Section 115 of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"] impugning the Order dated 21.04.2022 passed by the Additional District Judge-02, South East, Saket Courts, New Delhi [hereinafter referred to as "Impugned Order"]. By the Impugned Order, the Application filed by the Petitioners/Defendants under Order VII Rule 11 of the CPC [hereinafter referred to as "Application"] has been dismissed.

2. Learned Counsel for the Petitioner limits his challenge in the present Petition to the ground that the Plaint is barred by the proviso to Section 34 of the Specific Relief Act, 1963 [hereinafter referred to as "SR Act"], it is contended that although a declaration has been sought by the Respondent Nos. 1 and 2/Plaintiffs, the relief of possession has not been sought. It is contended that the suit is barred by law under the provisions of Order VII



Rule 11(d) of the CPC, despite which the Application filed has been dismissed.

3. Briefly, the facts are that the Respondent No. 1/Plaintiff filed a suit for declaration to the effect that a conveyance deed dated 11.11.2010 and mutation dated 23.09.2011 be declared as null and void and for the consequential relief of rendition of accounts and permanent injunction. The Petitioner/Defendant before the learned Trial Court filed an Application under Order VII Rule 11 of the CPC. The plea in the Application was that the suit has not been valued properly for the purposes of Court fee and jurisdiction and that the Plaint is barred by the provisions of Section 34 of the SR Act.

4. The learned Trial Court while relying on the judgement of the Coordinate Bench of this Court in ***Vijay Manchanda and Ors. v. Ashok Manchanda***¹ which has been upheld by the Supreme Court² has held that a co-owner has no right to recover the possession from another co-owners and the co-owner is only entitled to maintain a suit for partition. Further, it held that a party cannot be forced to claim of relief of partition and therefore, in the present case, seeking declaration of the Conveyance Deed as well as the mutation done thereunder as null and void cannot be compulsorily clubbed with the relief of possession as the Plaintiff has claimed to be only a co-sharer in the suit property to the extent of a 25% share.

5. As stated above, the learned Counsel appearing on behalf of the Petitioner has restricted his challenge to the ground that although a declaration has been sought by the Respondent No. 1/ Plaintiff, the relief of

¹ 2009 SCC OnLine Del 4076

² SLP (C) 8872/2010 dismissed on 01.04.2010



possession has not been sought.

6. Learned Counsel appearing on behalf of the Petitioner relies upon the proviso to Section 34 of the SR Act to submit that in terms of the proviso, since the relief of possession has not been sought by the Petitioner, the Application ought to have been allowed. In addition, the learned Counsel appearing on behalf of the Petitioner relies upon the judgment of the Coordinate Bench of this Court in ***Kanak Jain and Ors. vs. Chakresh Kumar Jain***³.

7. Learned Counsel appearing on behalf of the Respondent No. 1/Plaintiff, on the other hand, submits that the Impugned Order does not suffer from any infirmity so as to be challenged under the provisions of Section 115 of the CPC. He further submits that the challenge in respect to the proviso to Section 34 of the SR Act is not maintainable in a case where the property is joint. Reliance in this behalf is placed on the judgment of a Coordinate Bench of this Court dated 15.12.2009 in ***Vijay Manchanda*** case, wherein it has been held that since the parties were in joint possession and the claim of the Plaintiff is not of exclusive possession, consequential relief of possession is not requisite.

8. The proviso to Section 34 of the SR Act reads as follows:

“34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

[Emphasis Supplied]

³ 2019 SCC OnLine Del 8271



9. The suit that has been filed before the learned Trial Court for declaration and permanent injunction. It is the case of the Respondent No.1/Plaintiff that the Plaintiff and Defendants No. 1 to 3 are all married to 4 brothers and are sisters-in-law. The Plaintiff and Defendants No. 1 to 3 had purchased the suit property with their personal funds to the extent of 25% undivided share each therein. It is further the case of the Respondent No.1/ Plaintiff that the suit property is lying vacant and is in joint possession of all the co-owners. It is further set out that the cause of action to file the plaint arose when some documents were forged by the Petitioner/Defendant No.1 mutating the property. It is apposite to extract paragraphs 8 and 29 of the Plaint below:

“8. The plot constituting part of the suit property was purchased by the Plaintiff and the Defendant Nos. 1 to 3 out of their own personal funds. The husbands of the Plaintiff and the Defendants No. 1 to 3 are real brothers and they were running a business of bathroom fittings under the brand name of “Dripless”. The suit property was used as one of the marketing offices of their goods which were manufactured by various family owned companies/entities like M/s Delta Factors (I) P Ltd., M/s Dripless faucets (India), etc. The basement of the suit property was used as godown. There was a small display showroom of the goods on the ground floor and offices of the husbands of the Plaintiff and the Defendant Nos. 1 to 3 on Mezzanine and First Floor. A furnace to assist in manufacturing activities was also operated on the ground floor for casting process, however, due to strict pollution norms, he same was shut down. Later, due to the slowdown in the market, no work was carried out at the suit property and use of the suit property was discontinued. The suit property since then and as on date is lying vacant and is in joint possession of all the family members, i.e. the Plaintiff and the Defendant Nos. 1 to 3 and their respective husbands.

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29. The Defendant No. 1 and her husband, taking advantage of the situation that the entire suit property is lying vacant since many years, illegally by forging and fabricating documents got the same mutated and conveyed in the name of the Defendant No. 1 without approval or consent of the Plaintiff.”

[Emphasis Supplied]



10. The Supreme Court in the *Neelavathi & Ors. v. N. Natrajan & Ors.*⁴ has held that before a plaintiff could be called upon to pay court fee under Section 37(1) of the Court Fees Act, 1870 on the ground that the plaintiff has been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that the plaintiff has been “excluded” from joint possession to which the plaintiff is entitled in law. As long as a party has a share in the property, the law presumes his possession. The relevant extract *Neelavathi* case is set out below:

“8...

Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been “excluded” from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession.”

[Emphasis Supplied]

10.1 This Court in *Sakshi Dhall vs. Smt. Indira Dhall & Ors.*⁵ has while relying on the judgement of Supreme Court in *Neelavathi & Ors. v. N. Natrajan & Ors.*⁶ and the judgement of the Coordinate Bench in *Tara Chand Gaur v. Satish Chand Sharma & Anr.*⁷ held that where the suit property is a joint property and ‘ouster’ or exclusion of possession from the suit property has not been specifically pleaded by the Plaintiff in the plaint the Court shall at the preliminary stage presume the Plaintiff to be in possession unless it is proved to the contrary and that in such a case the

⁴ AIR 1980 SC 691

⁵ C.R.P. 93/2025 dated 14.05.2025

⁶ AIR 1980 SC 691

⁷ 2018 SCC OnLine Del 12923



Plaintiff would only be liable to pay fixed court fee as per the Article 17(vi), Schedule II of the Court Fees Act, 1870 [hereinafter referred to as “Court Fees Act”] and not *ad valorem* Court fees on the market value of the suit property. The relevant extract of the ***Sakshi Dhall*** case is set out as below:

“13.1 The Supreme Court in the Neelavathi case has held that it is the general principle of law that in the case of co-owners of an immovable property, the possession of one is synonymous with the possession of all, unless ouster or exclusion is proved. To be in joint possession of the immovable property, in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. So, as long as the right to a share and the nature of the property as joint is not disputed, the law presumes that the co-owner is in joint possession unless the co-owner is excluded from such possession. The relevant extract of the Neelavathi case is set out below:

“8...

It will be seen that the court fee is payable under Section 37(1) if the plaintiff is “excluded” from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided “joint family property” though not in the strict sense of the term. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession...”

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15.1 Thus, the Respondent No.1/Plaintiff has averred that she is a co-owner of the suit property and has relied on the SC judgment as well. **As per the SC judgment, the suit property is a joint property and ‘ouster’ or exclusion of possession from the suit property has not been specifically**



pleaded by Respondent No.1/Plaintiff in the plaint. Thus, and at the preliminary stage at which the proceedings before the learned Trial Court are at, the law would presume the Respondent No.1/Plaintiff to be in possession unless it is proved to the contrary.

15.2 Since Respondent No.1/Plaintiff would be considered to be in possession of the suit property, Respondent No.1/Plaintiff would only be liable to pay fixed court fee as per the Article 17(vi), Schedule II of the Court Fees Act and not ad valorem Court fees on the market value of the suit property.

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15.4 Thus, the contention of the Petitioner that ad valorem court fee on the market value of the suit property has to be paid in view of the plea of ouster is without any merit."

[Emphasis Supplied]

10.2 A Coordinate Bench of this Court in the ***Tara Chand Gaur*** case has held that a co-owner seeking partition of an immovable property is liable to pay only fixed court-fee under Schedule II, Article 17(vi) of the Court Fees Act, as such co-owner is presumed to be in constructive possession unless ouster is specifically pleaded and proved by the other co-owners. Determination of exclusive possession or ouster is a question of fact and must be established through evidence. The relevant extract of ***Tara Chand Gaur*** case is reproduced below:

"6. So far as the third aspect of the court-fee having not been paid is concerned because the appellant/plaintiff has only affixed a court fee of Rs. 20/-, once again, the trial court has erred in holding that since the appellant/plaintiff had valued the suit at Rs. 1 crore, and he was not in possession of the suit property, therefore, the appellant/plaintiff was liable to pay court-fee on his 1/3rd share. In law, when a partition is sought by a co-owner, court-fee which is payable is a fixed court-fee in terms of Schedule II, Article 17(vi), of the Court-fees Act, 1870 inasmuch as every co-owner is either in actual physical possession of whole or part of the property or in law has to be taken in deemed possession or constructive possession of the co-owned property. If a defendant is a co-owner who is in actual physical possession of the complete property, even then, the possession of one or more such co-owners who are defendants in possession, the possession is for and on behalf of all co-owners including the plaintiff(s), and whether there exists exclusive



possession of the respondents/defendants and the same acts as an ouster of the plaintiff(s) is a question of fact, and only when this question of fact is proved by the respondents/defendants by leading evidence, it can be held that the appellant/plaintiff was not in possession, physical or constructive, of the suit property, so that court fee is payable for the 1/3rd share as claimed by the appellant/plaintiff. In fact, this issue of court-fee is very much inter-linked with the issue of limitation because the appellant/plaintiff is not in possession, and both are factual issues which will have to be proved by the respondents/defendants that the appellant/plaintiff was not in physical possession of the suit property and ouster has been proved against the appellant/plaintiff by respondents/defendants after leading evidence."

[Emphasis Supplied]

11. The Petitioner/Defendant have stated that the suit is not maintainable as the consequential relief of possession has not been sought by the Respondents/Plaintiffs. The Petitioner/Defendant has contended that the omission of consequential relief of possession when the Plaintiff is not in possession would make a suit liable to be not maintainable. It has further been contended that in terms of Section 7(iv)(c) of the Court Fees Act, the valuation of a property shall be calculated in terms of the market value of the suit property.

11.1 Section 7(iv)(c) of the Court Fees Act reads as follows:

"7. Computation of fees payable in certain suits.—The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

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(iv) **In suits**—

for movable property of no market-value.—(a) for movable property where the subject matter has no market-value, as, for instance, in the case of documents relating to title,

to enforce a right to share in joint family property.—(b) to enforce the right to share in any property on the ground that it is joint family property,

for a declaratory decree and consequential relief.—(c) **to obtain a declaratory decree or order, where consequential relief is prayed,**



for an injunction.—(d) to obtain an injunction,

for easements.—(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

for accounts.—(f) for accounts—

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

In all such suits the plaintiff shall state the amount at which he values the relief sought.”

[Emphasis Supplied]

12. It is the case of the Respondent No. 1/Plaintiff that she is in joint ownership with the Petitioner and Respondent Nos. 2 and 3. Thus, the question of seeking consequential relief is not required. The Petitioner has, on the other hand, contended that since the Respondent No. 1/Plaintiff has claimed to be ousted from the property, *ad-valorem* court fee based on the market value of the suit property is required to be paid under Section 7(iv)(c) of the Court Fees Act. The learned Trial Court has after examining the contentions raised by the Petitioner deemed it apposite to dismiss the Application filed by the Petitioner in view of the settled law in this behalf.

13. It is settled law that for the purposes of an Application under Order VII Rule 11 of the CPC, only the averments of the Plaint are required to be examined and those too on a demurer. The facts that have been set out in the Plaint are that the Plaintiffs and the Defendant are the co-owners of the suit property and being in joint possession thereof. The Plaint further sets out that the Plaintiff [Respondent No. 1] and Defendant Nos. 1 to 3 [Petitioner and Respondent Nos. 2 and 3] are all married to four brothers and are sister-in-laws and that each of them are owners of the suit property to the extent of 1/4 undivided share each in the suit property.

13.1 It is the case of Respondent No.1/Plaintiff in the plaint that the plot



constituting the suit property was purchased by the Respondent No.1/Plaintiff and the Petitioner and Respondent Nos. 2 and 3 out of their own personal funds and that their husbands were running a business of bathroom fittings under the brand name 'Dripless' and the property was used as one of the marketing offices of their goods which were manufactured by various family owned companies/entities like M/s Delta Factors (I) Pvt. Ltd., M/s Dripless Faucets (India), etc. The basement of the suit property was used as godown and there was a small display showroom of the goods on the ground floor and offices of the husbands of the Respondent No. 1/Plaintiff and the Petitioner and Respondent Nos. 2 and 3 on mezzanine and first floor. To assist in manufacturing activities, a furnace was also set up on the ground floor, however, due to strict pollution norms, the same was shut down and no work was being carried out. The suit property was thus lying vacant and is in the joint possession of all the family members of the Respondent No. 1/Plaintiff and the Petitioner and Respondent Nos. 2 and 3.

13.2 In essence it is the case of the Respondent No. 1/Plaintiff that the Petitioner and Respondent Nos. 2 and 3 were permitted to use half undivided share in the suit property, however, by forging and fabricating documents, the property has been mutated and conveyed without approval or consent of the Respondent No. 1/Plaintiff. It is thus the case of the Respondent No.1/Plaintiff that the Respondent No. 1/Plaintiff is in possession of the half undivided share through the Petitioner and Respondent Nos. 2 and 3.

13.3 It is apposite to set out the relevant extract of the Plaint below:

*"2. The Defendant Nos. 1 to 3, viz. Smt. Kiran Gupta W/o Sh. Pawan Kumar Gupta, Smt. Anjali Gupta, W/o Sh. Vinay Kumar Gypta, and Smt. Alka Gupta, W/o Sh. Arun Kumar Gupta, are the sisters-in-law of the Plaintiff. **The Plaintiff and the Defendant Nos. 1 to 3 are the sisters-in-law and they are married to the four brothers.***



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5. One, Sh. Chaman Lal, was the original allottee and the perpetual lessee of the plot constituting part of the suit property by virtue of the Lease Deed dated 02.05.1991 bearing Registration No. 346 in Additional Book No. 1, Volume No. 39 from Pages 149 to 154 and registered on 06.05.1991.

6. **Sh. Chaman Lal conveyed his title and rights in the suit property to the Plaintiff, Smt. Nina Gupta, the Defendant No.1, Smt. Kiran Gupta, the Defendant No. 2, Smt. Anjali Gupta, and the Defendant No. 3 Smt. Alka Gupta.** In pursuance to conveyance of the title and rights in the suit property, Sh. Chaman Lal executed a Will dated 31.05.1991 that was registered on 29.08.1991 as well as an Agreement to Sale and Purchase dated 29.05.1991 in respect of the suit property in favour of all the said purchasers, i.e. the Plaintiff and the Defendant Nos. 1 to 3. Apart thereof, Sh. Chaman Lal executed a registered Power of Attorney dated 29.08.1991 In favour Shri Ram Lal Gupta, the father in law of the Plaintiff and the Defendant Nos. 1 to 3, without any Interest In the suit property.

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8. The plot constituting part of the suit property was purchased by the Plaintiff and the Defendant Nos. 1 to 3 out of their own personal funds. The husbands of the Plaintiff and the Defendants No. 1 to 3 are real brothers and they were running a business of bathroom fittings under the brand name of "Dripless". **The suit property was used as one of the marketing offices of their goods which were manufactured by various family owned companies/entities like M/s Delta Factors (I) P Ltd., M/s Dripless faucets (India), etc.** The basement of the suit property was used as godown. There was a small display showroom of the goods on the ground floor and offices of the husbands of the Plaintiff and the Defendant Nos. 1 to 3 on Mezzanine and First Floor. **A furnace to assist in manufacturing activities was also operated on the ground floor for casting process, however, due to strict pollution norms, he same was shut down.** Later, due to the slowdown in the market, no work was carried out at the suit property and use of the suit property was discontinued. **The suit property since then and as on date is lying vacant and is in joint possession of all the family members, i.e. the Plaintiff and the Defendant Nos. 1 to 3 and their respective husbands.**

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11. Thereafter, the Plaintiff started making enquiries and found out that the Defendant No. 1 In conspiracy with her husband, Mr. Pawan Kumar Gupta, other Defendants has got the **Conveyance Deed dated 11.11.2010 executed in favour of the Defendant No. 1.** The Conveyance Deed dated 11.11. 2010 was registered. By Virtue of the said Conveyance Deed dated 11.11.2010, the Defendant No. 1 was asserting the ownership rights over the suit property.



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13. It is pertinent to mention that Sh. Chaman Lal passed away in the year 1996 **and it is incomprehensible that he would have executed the alleged power of attorney dated 17.12.1998 after more than 2 years of his death.** Evidently, the alleged power of attorney dated 17.12.1998 was forged and fabricated by the Defendant No. 1 in connivance with others in order to usurp the suit property.

14. In order to punish the perpetrators in accordance with the law of land, **the Plaintiff lodged a police complaint with the S.H.O., Police Station Hazrat Nizammudin on 30.10.2017.** Thereafter, the matter was transferred to Police Station Okhla Industrial Area, Phase-I. The Plaintiff had also submitted a reminder to the DCP, District South East. However, no steps were taken by Police to register the FIR despite the best efforts of the Plaintiff.

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18. Basically, the Defendant No. 1 in connivance with other persons **implanted new documents in order to make the authorities believe her concocted story.** The file of the suit property with the Defendant No. 4 was also reconstructed at behest of the Defendant No. 1 which as on date comprises nothing but the documents as provided by the Defendant No. 1 to the Defendant No. 4.

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20. Upon making further enquiries by the Plaintiff from various departments, **it transpired that the propounded power of attorney dated 17.12.1998 is also a forged and fabricated document.** The said propounded power of attorney dated 17.12.1998 has been manufactured by the Defendant No. 1 after the Plaintiff had filed her complaint before the concerned police station in October, 2017.

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23. It is also pertinent to mention that the Defendant No. 4 does not execute conveyance deed unless and until the Agreement to Sell, Will, Power of Attorney, Possession Letter and Receipt are submitted by the person requesting for conveyance. **However, In the present case, the Defendant No. 4 has executed the conveyance deed dated 11.11.2010 on basis of one stand alone forged power of attorney dated 17.12.1998.**

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26. On the basis of the conveyance deed dated 11.11.2010, the Defendant No. 1 had also got the mutation transferred in her name in the records of the Defendant No.5 on 23.09.2011.

27. It can be stated with conviction that the mutation and execution of the Conveyance Deed dated 11.11.2010 in favour of the Defendant No. 1



could not have been done without collusion and connivance with the concerned officials of the Defendant Nos. 4 and 5.

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29. The Defendant No. 1 and her husband, taking advantage of the situation that the entire suit property is lying vacant since many years, illegally by forging and fabricating documents got the same mutated and conveyed in the name of the Defendant No. 1 without approval or consent of the Plaintiff.

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33. The Plaintiff reserves her right to seek the relief of partition by metes and bounds and possession of the one-fourth undivided share of the suit property owned by the Plaintiff.”

[Emphasis Supplied]

14. The Respondent No. 1/Plaintiff has stated that she continues to be in possession of the suit property through permissive use by the Petitioner and Respondent Nos. 2 and 3. It is settled law that in the case of co-ownership of a property, each co-owner is deemed to be in possession of the property.

14.1 The Supreme Court in the case of ***Nagabhushanammal (Dead) By LRs v. C. Chandikeswaralingam***⁸ held that in a joint property, possession of one co-owner is treated as possession on behalf of all co-owners. A claim of ouster or adverse possession against a co-owner cannot be presumed merely from sole possession; it must be proved by clear denial of title, long and uninterrupted exclusive possession, and open assertion of hostile ownership. Thus, without these elements, the law presumes joint possession and no ouster is made out. It is apposite to set out the relevant extract of ***Nagabhushanammal*** case below:

*“22. This Court in Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri [Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri, (1971) 1 SCC 597] held that (SCC p. 605, para 18) **possession of one co-owner is presumed to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in***

⁸ (2016) 4 SCC 434



hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

23. A Three-Judge Bench of this Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy* [*P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314], while examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows: (AIR pp. 317-18, para 4)

“4. Now, the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario*. (See *Secy. of State for India in Council v. Debendra Lal Khan* [*Secy. of State for India in Council v. Debendra Lal Khan*, 1933 SCC OnLine PC 65 : (1933-34) 61 IA 78], IA p. 82.) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See *Radhamoni Debi v. Collector of Khulna* [*Radhamoni Debi v. Collector of Khulna*, 1900 SCC OnLine PC 4 : (1899-1900) 27 IA 136], IA p. 140.) **But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Corea v. Appuhamy* [*Corea v. Appuhamy*, 1912 AC 230 (PC)] .) It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other.”**

24. This Court in *Vidya Devi v. Prem Prakash* [*Vidya Devi v. Prem Prakash*, (1995) 4 SCC 496] held that : (SCC p. 505, para 28)

“28. ‘Ouster’ does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long



and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.”

[Emphasis Supplied]

15. A Coordinate Bench of this Court in ***Vijay Manchanda*** case has held that where the plaintiff seeks the relief of declaration simpliciter without the relief of possession on the ground of his being a co-owner of the suit property, the plaint could not be rejected on the ground that relief of possession is not claimed. The Coordinate Bench further reiterated that one co-owner cannot claim the relief of possession against other co-owner(s). The relevant extract of the ***Vijay Manchanda*** case is below:

“2. The suit from which these petition and appeal have arisen was instituted by Shri Ashok Manchanda hereinafter referred to as the plaintiff against Shri Vijay Manchanda and Smt Poonam Manchanda hereinafter referred to as the defendants. The suit was instituted for cancellation of sale deed dated 10th August, 2000 executed by the defendant No.1 Shri Vijay Manchanda in favour of the defendant No.2 Smt Poonam Manchanda with respect to the property No.699, first floor, double storey, New Rajinder Nagar, New Delhi. It is, inter alia, the case of the plaintiff in the plaint that the plaintiff and the defendant No.1 are brothers; the defendant No.2 is the wife of the defendant No.1; that the plaintiff and the defendant No.2 had vide agreement dated 17th August, 1993 agreed to purchase the aforesaid property from one Smt Usha Sachdev and had paid the entire sale consideration to the said Smt Usha Sachdev and the property agreed to be purchased being lease hold and the execution of the sale deed thereof being not immediately possible, the said Smt Usha Sachdev had, as per practice, executed a general power of attorney with respect to the said property in favour of the defendant No.1 enabling the defendant No.1 to sell the said property; that the plaintiff and the defendant No.2 in part performance of the agreement to sell were also put into possession of the aforesaid property and were thereafter holding themselves out as owner of the said property having half share each; that the defendant No.1 however misused the power of attorney executed in his favour in pursuance to the agreement to sell aforesaid and executed sale deed of one half share in the property in favour of the defendant No.2 on 9th August, 2000 and another sale deed with respect to the other half share in the property on 10th August, 2000 thereby purporting to make his



wife the defendant No.2 who under the agreement to sell was entitled to only half share in the property, the absolute owner of the property; that the plaintiff learnt of the execution of the said sale deeds only on 29th October, 2007. The plaintiff thus instituted the suit for cancellation of the sale deed dated 10th August, 2000 with respect to the one half share in the property.

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11. The main plea which arises for consideration is whether it can be said that the suit for the relief of cancellation of sale deed alone without claiming relief of possession is not maintainable. First, on the factual aspects. The counsel for the plaintiff has contended that for the purposes of adjudication of application under Order 7 Rule 11 of the CPC only the plaint is to be seen and the averments of the defendants in the written statement or otherwise cannot form the basis of rejection of the plain. He has in this regard relied upon *Mayar (H.K.) Ltd. Vs. Owners and Parties, Vessel M.V. Fortune Express* AIR 2006 SC 1828. He has drawn attention to para 6 of the plaint which is as under:

"That the parties were in the possession of the suit premises since the execution of the agreement to sell. The plaintiff and defendant No.2 held themselves to be the owner of the respective half property."

12. He has contended that the case in the plaint is of the plaintiff being in possession of the property and thus the question of the plaintiff being required to claim the further relief of possession does not arise, even if the legal proposition aforesaid were to be correct.

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15. The next question which arises is whether the plaintiff can maintain a suit for cancellation of a document simplicitor even when the plaintiff is found entitled to further relief. The counsel for the defendants has contended that the principle in the proviso to Section 34 of the Specific Relief Act applies to Section 31 also; the same being a facet of declaration only. He has in this regard also drawn attention to AIR 1932 Vindya Pradesh 69. On the contrary, the counsel for the plaintiff has contended that Sections 31 and 34 are situated in different chapters of the Specific Relief Act and while the legislature has deemed it appropriate to insert the proviso in Section 34, no such condition has been imposed in Section 31.

16. However, the aforesaid question need not detain me further in as much I am unable to accept the plea of the defendants that the plaintiff is entitled to the further relief of possession. The claim of the plaintiff is not of exclusive ownership of the property/flat. The claim is of joint ownership of the property/flat along with the defendant No.2. One co-owner cannot claim the relief of possession against the other co-owner. Thus contrary to what the counsel for the defendants has urged, I do not



find the plaintiff to be entitled to a further relief of possession and for the reason of not claiming which relief it can be held that the plaintiff is not entitled to maintain the suit for the relief of declaration of cancellation of document simplicitor. In Joy Gopal Singha Vs Probodh Chandra Bhattacharjee AIR 1935 Cal 646, a Division Bench held that a co-owner / co-sharer has no right to recover possession from another co-owner / co-sharer. This view has consistently been taken by all the High Courts as well as the Supreme Court, as noticed by another Division Bench in Minor Nantu Bag Vs Rasana Bala Dasi AIR 2001 Cal 53. The plaintiff as co-owner is only entitled to maintain a suit for partition against the other co-owner. However, the relief of partition is not such which a person/party can be compelled to claim. A person/party may be satisfied in keeping the property joint and may not be interested in partition and separate possession of his share. It would be inequitable if a co-owner is forced to have a partition of the property and cannot otherwise get his share of the property which is actually being received by his co-sharer even though the effect of partition may be a practical destruction of the property or a deterioration in its value. It was held in Abu Shahid Vs Abdul Dobhash AIR 1940 Cal 363 that this principle which is statutorily recognized in English law can be applied as a rule of equity, justice and good conscience in India. It thus cannot be said that merely because the plaintiff is claiming the relief of cancellation of sale deed of one half share of the property to which the plaintiff claims entitled to, he is also required to necessarily claim the relief of partition. If the plaintiff succeeds in having the relief of cancellation of sale deed, the result thereof would be that the defendant No.2 and the plaintiff in terms of the agreement to sell would be the owners of one half share each in the property and the plaintiff would be entitled to the sale deed of the other half share in his favour.”

[Emphasis Supplied]

16. The Petitioner has not been able to show the Court any specific averment related to ouster of possession. In any event, and as set out above it is settled law that in the case of a joint property, possession of one co-owner is deemed to be possession of all. As long as a party has a share in the property, the law presumes his possession.

17. The judgement in the case of **Kanak Jain** case that has been cited by the learned Counsel appearing on behalf of the Petitioner wherein the Coordinate Bench has reiterated the principles held in the **Vijay Manchanda**



case that no co-owner/joint owner of the property can be compelled to seek partition and if he desires to keep the property joint, can do so without foregoing his right to claim a share of the immovable property of which he is the co-owner/joint owner will stand extinguished. It further rejected the averment that ad valorem Court fee is to be paid.

18. Section 115 of the CPC reads as follows:

“Section 115 – Revision

The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.”

[Emphasis Supplied]

19. The Supreme Court in ***Ambadas Khanduji Shinde v. Ashok Sadashiv Mamurkar***⁹, has held that the revisional jurisdiction of the High Court is restricted to cases of illegal or irregular exercise of jurisdiction by the subordinate courts. Under Section 115 of CPC, it is not open for the High Court to correct errors of facts or law unless they go to root of the issue of jurisdiction. The Supreme Court in ***Ambadas Khanduji*** case has held:

“14. Apart from the factual aspect, order lacks merit on the ground of jurisdiction. The High Court cannot interfere with the concurrent factual findings while exercising jurisdiction under Section 115 of the Civil Procedure Code. It is settled law that revisional jurisdiction of the High Court is restricted to cases of illegal or irregular exercise of jurisdiction by the

⁹ (2017) 14 SCC 132.



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subordinate courts. Under Section 115 of the Civil Procedure Code, it is not open for the High Court to correct errors of facts or law unless they go to root of the issue of jurisdiction. In the facts on hand, the courts below have passed reasoned orders well within the jurisdiction conferred upon them. We arrive at the conclusion that the High Court committed error in interfering with the judgment and decree of the trial court.”

[Emphasis Supplied]

20. The examination by the Court as above shows that no ground has been made out for exercise of revisionary jurisdiction.
21. The Petition is, accordingly, dismissed. The pending Applications stand closed.
22. It is clarified that this order is not to be construed as an opinion on the merits of the case. Both parties are at liberty to raise all issues during the final hearing of the matter.
23. The parties will act based on digitally signed copy of the order.

TARA VITASTA GANJU, J

AUGUST 22, 2025/ ha/r